UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

DALE SCHEXNAIDER

VS.

TIM WILKINSON

CIVIL ACTION NO. 07-0763

SECTION P

JUDGE DRELL

MAGISTRATE JUDGE KIRK

REPORT AND RECOMMENDATION

Before the court is an application for writ of *habeas corpus* (28 U.S.C. §2254) filed in April 2007 by *pro se* petitioner Dale Schexnaider. Petitioner is an inmate in the custody of Louisiana's Department of Public Safety and Corrections. He is incarcerated at the Winn Correctional Center, Winnfield, Louisiana. Petitioner attacks his 2002 convictions for forcible rape and indecent behavior with a juvenile in the Ninth Judicial District Court, Rapides Parish. This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. §636 and the standing orders of the court. For the following reasons it is recommended that the petition be **DENIED** and **DISMISSED WITH PREJUDICE** as time-barred by the provisions of 28 U.S.C. §2244(d).

Statement of the Case

On June 22, 2001 petitioner was arraigned on charges of indecent behavior with a juvenile and forcible rape. He pled not guilty and waived his right to trial by jury. His trial commenced

on June 26, 2001 but that first trial ended in a mistrial.

Petitioner again waived trial by jury and another bench trial commenced on August 6, 2002. On August 9, 2002 petitioner was found guilty as charged. On October 7, 2002 he was sentenced to consecutive sentences of 20 years on the forcible rape and 5 years on the indecent behavior convictions. Petitioner filed a Motion for a New Trial, a Motion in Arrest of Judgment, and a Motion to Reconsider Sentence. The Motions for New Trial and Reconsideration of Sentence were denied, however, no action was taken on petitioner's Motion in Arrest of Judgment. Petitioner timely appealed his conviction to the Third Circuit Court of Appeals. See introductory paragraphs in State of Louisiana v. Dale Michael Schexnaider, 2003-144 (La. App. 3 Cir. 6/4/2003) at *1, 852 So.2d 450, 452-53.

Petitioner's Motion in Arrest of Judgment complained that his prosecution and conviction for indecent behavior amounted to double jeopardy because he had previously been charged in Caddo Parish with child pornography and those charges were resolved in conjunction with a plea agreement. [doc. 5, p. 1[1]] On June 4, 2003, the Court of Appeals rendered its opinion on appeal. The court found patent error in the trial court's failure to dispose

[1] See State v. Schexnaider, 2003-144 at **3; 852 So.2d at 453, "The Defendant's Motion in Arrest of Judgment reads as follows: 'Double Jeopardy precluded this trial; Specifically, Mr. Schexnieder [sic] entered into a guilty plea regarding the same offense in Caddo Parish, Louisiana. properly prepare his defense for the scheduled trial date.' [sic]"

of the motion in arrest of judgment prior to sentencing as required by the Louisiana statutes (La. C.Cr.P. arts. 860-861), therefore, the court vacated the sentence imposed on the indecent behavior conviction and remanded the case for a contradictory hearing and resolution of the unresolved Motion in Arrest of Judgment. State of Louisiana v. Dale Michael Schexnaider, 2003-144 (La. App. 3 Cir. 6/4/2003), 852 So.2d 450, 453-54.

Petitioner's appellate counsel argued two Assignments of Error, sufficiency of the evidence and excessiveness of sentence. Both were found to be without merit. State v. Schexnaider, 852 So.2d at 457, 459, and, 461. Petitioner was permitted to argue a *pro se* assignment of error - ineffective assistance of trial counsel. Having found that the appellate record was insufficient to make a definitive finding with regard to the ineffective assistance claim, the court likewise denied relief. State v. Schexnaider, 852 So.2d at 462. Petitioner received notice of the Third Circuit's judgment from his court-appointed appellate counsel on June 9, 2003. [doc. 1-4, pp. 14 and 33; doc. 5, pp. 5-6] Counsel provided petitioner with a copy of the Third Circuit's opinion and advised, "You can file an application for writs to the Louisiana Supreme Court. We will not do so. Indeed, this action by the appellate court ends our work on your behalf. It is our considered professional opinion that such an application would not be granted, based on the consideration of the Supreme

Court rules. If you choose to file such an application, you will have to file it within thirty (30) days of the date of the decision." [doc. 5, p. 5] Petitioner was also advised, "We would call your attention to the provisions of C.Cr.P. art. 930.8 which require that any application for post conviction relief be filed within two (2) years of the final judgment by the appellate court on your appeal ... Federal law mandates that any habeas corpus proceeding filed to contest the conviction be filed within one (1) year of the final decision on appeal, excluding the time any State post conviction relief application is pending, so this is a shorter and serious deadline." [*id.*, pp. 5-6]

Petitioner did not seek further direct review in the Louisiana Supreme Court. [doc. 5, p. 7] On September 8, 2003, the hearing on the outstanding Motion in Arrest of Judgment was convened in the District Court. On September 9, 2003, petitioner's attorney advised him of the results of that hearing: "As you are also aware this was simply for record purposes as it was the identical issue that was argued in the pretrial Motion to Quash. I introduced the record and testimony of that particular hearing yesterday and incorporated it in our argument. Judge Ryland denied this motion." [doc. 5, pp. 8-9] Petitioner did not seek further appellate or collateral review of this hearing. [doc. 5, p. 7]

On or about June 7, 2005 petitioner filed an Application for

Post-Conviction Relief in the Ninth Judicial District Court. [doc. 1-4, pp. 12-33[2]] On August 8, 2005, the District Court denied relief and provided Written Reasons for Judgment. [doc. 5, pp. 10-14]

On September 12, 2005[3] petitioner applied for writs in the Third Circuit Court of Appeals. [doc. 1-3, pp. 31-32; doc. 1-4,

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[2] In his pleading, petitioner claimed that he filed his Application for Post-Conviction Relief in June 2003. [doc. 1-1, paragraph 7(b)(iii)] However, according to the exhibits submitted by petitioner, he signed the verification of his Application for Post-Conviction Relief and the certificate of service on June 7, 2005. [doc. 1-4, pp. 31 and 33] In must be presumed that the dates on the exhibit are accurate. Further, in the absence of any contradictory information, petitioner will be afforded the benefits of the "mailbox" rule which states that prisoner litigants proceeding pro se are deemed to have filed their pleadings on the date that they were handed to prison authorities for mailing. See State ex rel. Egana v. State, 00-2351 (La.9/22/00), 771 So.2d 638, in which the Louisiana Supreme Court approved of the use of the "mailbox rule" referred to in Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L.Ed.2d 245 (1988). The date that petitioner verified and signed his pleadings is clearly the earliest date that the pleadings could be said to have been filed.

With regard to the date petitioner filed his Application for Post-Conviction Relief, the discrepancy between the date alleged in the pleading and the date that appears on the exhibit was pointed out to petitioner in the Memorandum Order of May 25, 2007. [See doc. 4 at fn. 1, p. 3] Among other things, petitioner was directed to provide "Information concerning the date petitioner filed his Application for Post-Conviction Relief in the District Court and information concerning whether or not any other post-conviction or collateral attacks were pending in the Louisiana Supreme Court prior to June 7, 2005, the date the undersigned has concluded that petitioner filed his first and only Application for Post-Conviction Relief..." [doc. 4, p. 8] Petitioner did not address this issue in his response to the May 25 order, and therefore, it must be presumed that petitioner's first and only application for post-conviction relief was filed on June 7, 2005.

In any event, on closer inspection, it is apparent that the pleading was not filed in June 2003. On the final page of the application, petitioner alleged that he included "13 exhibits for courts reference" including "Crayton Affidavit" and "Town Talk Articles." The "Crayton Affidavit" referred to was executed on May 26, 2005. [see doc. 1-3, p. 2] The "Town Talk Article" referred was dated August 3, 2004. [doc. 1-3, p. 1] Further, in the application for post-conviction relief, petitioner alleged that other than his direct appeal, he had filed no previous applications for post-conviction relief. [doc. 1-4, paragraph 12]

[3] Petitioner signed his pleading on September 12, 2005. See fn. 1, *supra*.

pp. 1-11] On some unspecified date the Third Circuit Court of Appeals denied relief and sent Notice of Judgment to petitioner.

On March 13, 2006 petitioner filed a writ application in the Louisiana Supreme Court. [doc. 1-3, pp. 19-30] On December 15, 2006 the Louisiana Supreme Court denied writs. State of Louisiana ex rel. Dale Schexnaider v. State of Louisiana, 2006-1213 (La. 12/15/2006), 944 So.2d 1281. [See also doc. 1-3, p. 3]

Petitioner signed his federal petition on April 10, 2007. [doc. 1-3, p. 18] It was mailed on April 24, 2007. [doc. 1-1, p. 9] It was received and filed on April 26, 2007.

Law and Analysis

This petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, the court must apply the provisions of AEDPA, including the timeliness provisions. Villegas v. Johnson, 184 F.3d 467, 468 (5th Cir. 8/9/1999); In Re Smith, 142 F.3d 832, 834, citing Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Title 28 U.S.C. §2244(d)(1)(A) was amended by AEDPA to provide a one-year statute of limitations for the filing of applications for writ of *habeas corpus* by persons such as petitioner, who are in custody pursuant to the judgment of a State court. This limitation period generally runs from "...the date on which the judgment became final by the conclusion of

direct review or the expiration of the time for seeking such review..." 28 U.S.C. §2244(d)(1)(A).[4]

However, the statutory tolling provision set forth in 28 U.S.C. §2244(d)(2) provides that the time during which a properly filed application for post-conviction relief was pending in state court is not counted toward the limitation period. Ott v. Johnson, 192 F.3d 510, 512 (5th Cir. 1999); Fields v. Johnson, 159 F.3d 914, 916 (5th Cir. 1998); 28 U.S.C. §2244(d)(2). Any lapse of time before the proper filing of an application for post-conviction relief in state court is counted against the one-year limitation period. Villegas, 184 F.3d 467, citing Flanagan v. Johnson, 154 F.3d 196, 197 (5th Cir.1998).

Federal courts may raise the one-year time limitation *sua sponte*. Kiser v. Johnson, 163 F.3d 326 (5th Cir. 1999).

Petitioner timely appealed his conviction and sentence. The Third Circuit affirmed his conviction for forcible rape and remanded the case to the District Court to resolve an outstanding Motion in Arrest of Judgment on June 4, 2003. State of Louisiana v. Dale Michael Schexnaider, 2003-144 (La. App. 3 Cir. 6/4/2003), 852 So.2d 450. Petitioner was notified of this disposition on

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[4] Nothing in the record before the court suggests that any State created impediments prevented the filing of the petition. Further, nothing in the record suggests that petitioner is relying on a constitutional right newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review. Finally, nothing in the record suggests that the factual predicate of petitioner's claims was only recently discovered. Thus, the limitations period should not be reckoned from the events described in 28 U.S.C. § 2244(d)(1)(B), (C), and (D).

June 9, 2003 [doc. 5, p. 4] and advised by his court-appointed appellate counsel that he had 30 days from the date of the Third Circuit's judgment within which to seek further direct review in the Louisiana Supreme Court. [doc. 5, p. 5] Petitioner's Motion in Arrest of Judgment was finally resolved on September 8, 2003 and petitioner, who was in court with his court-appointed counsel, was aware of the negative result on that same date. [see doc. 5, p. 8, Letter from Michael A. Brewer]

For AEDPA purposes, petitioner's judgment of conviction and sentence "became final by ... expiration of the time for seeking [direct] review" [28 U.S.C. §2244(d)(1)(A)], at the latest, thirty days following the September 8, 2003 hearing on the Motion in Arrest of Judgment or, on or about October 8, 2003.[5] Under 28 U.S.C. § 2244(d)(1) he had one year, or until October 8, 2004 to file his federal *habeas* petition.

Petitioner cannot rely on the statutory tolling provision of §2244(d)(2) because he did not file his first and only collateral attack in the state court until June 7, 2005 [doc. 1-4, pp. 31 and 33; and doc. 1-4, p. 14, paragraph 12; and, see fn. 2, *supra*]

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[5] Louisiana Supreme Court Rule X, §5(a) provides, "An application seeking to review a judgment of the court of appeal ... shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal..." As noted by petitioner's appellate counsel, petitioner had 30 days from June 4, 2003, the date of the Third Circuit's opinion, within which to seek further direct review in the Louisiana Supreme Court. Nevertheless, in light of the remand hearing, the undersigned has afforded the petitioner the benefit of the doubt and reckoned that the Rule X limitations period commenced with the District Court denied relief on the outstanding Motion.

and by that time, the limitations period had already long expired. Neither that filing, nor any of his subsequent filings in the Third Circuit Court of Appeals or the Louisiana Supreme Court (all of which were apparently timely under Louisiana law) could operate to toll the limitations period since these proceedings were filed after the federal limitations period had already expired, and, as stated above, the lapse of time before the proper filing of the application for post-conviction relief must be counted against the one-year limitation period. Villegas, 184 F.3d 467, citing Flanagan v. Johnson, 154 F.3d 196, 197 (5th Cir.1998).

Thus, a period of more than twelve un-tolled months elapsed between the date that petitioner's conviction became final and the date that his federal suit was filed; accordingly, his *habeas* claims are barred by the timeliness provisions codified at 28 U.S.C. § 2244(d).

The Fifth Circuit has held that the AEDPA's one-year statute of limitations can, in rare and exceptional circumstances, be equitably tolled. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998). However, "[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir.1999) (quotation marks omitted). Nothing of record supports

the application of equitable tolling in this instance. The petitioner was not actively misled by the defendant or anyone else; in fact, petitioner's court-appointed appellate counsel specifically warned petitioner about the one-year federal limitations period [doc. 5, pp. 5-6] but petitioner failed to heed that warning.

The petition is time-barred by the provisions of 28 U.S.C. § 2244(d)(1)(A). Equitable tolling does not apply. Dismissal is therefore recommended.

Accordingly,

IT IS RECOMMENDED that this petition for *habeas corpus* should be **DENIED AND DISMISSED WITH PREJUDICE** because petitioner's claims are barred by the one-year limitation period codified at 28 U.S.C. §2244(d).

Under the provisions of 28 U.S.C. Section 636(b)(1)(C) and Rule 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten (10) days after being served with a copy of any objections or response to the District Judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date

of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See,* Douglass v. United Services Automobile Association, 79 F.3d 1415 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers at Alexandria, Louisiana, this 20th day of July, 2007.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE